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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1815

NORTHWAY COIN-CLEAN, INC.
Petitioner,

v.

BORG-WARNER CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Has a petitioner been deprived of property without due process of law when a United States District Court granted Summary Judgment against it on the duel grounds that its cause of action was barred by the applicable Statute of Limitations and its cause of action had previously been dismissed with finality by another United States District Court?

COUNTER-STATEMENT OF CASE

The petition seeks a review of a judgment order entered by the United States Court of Appeals for the Third Circuit on November 20, 1973. The judgment order affirmed an order entered on January 11, 1973 by Judge R. Dixon Herman of the United States District Court for the Middle District of Pennsylvania granting respondent's Motion for Summary Judgment at Civil Action No. 72-301 (App. 10-11). The United States Court of Appeals for the Third Circuit denied rehearing on January 3, 1974 (App. 12).

The action for which review is sought was brought by petitioner, Northway Coin-Clean, against respondent, Borg-Warner Corporation (App. 18-21). Although this was the first time that the action had been brought in the Middle District of Pennsylvania, the United States District Court for the Western District of Pennsylvania had previously had an opportunity to adjudicate the identical claim at Civil Action No. 66-865 (hereinafter referred to as "the Western District action"). A detailed account of the Western District action must be presented since petitioner's claim, in its Petition for Writ of Certiorari, is that it was denied due process of law by reason of the United States Court of Appeals for the Third Circuit's affirmance of the District Court's holding that "... the action has already been dismissed with finality at Civil Action No. 66-865 by the United States District Court for the Western District of Pennsylvania" (App. 57).

On or about August 1, 1962 petitioner purchased from a distributor certain Norge coin-operated laundry and dry cleaning equipment manufactured by respondent

and opened its business known as Northway Cleaning Village (App. 19). On July 19, 1966, petitioner filed its Complaint initiating the Western District action (App. 22). That Complaint alleged that respondent had breached its warranties and made fraudulent misrepresentations to the petitioner in connection with the sale to petitioner of the aforementioned coin-operated dry cleaning equipment.*

For the two years following the filing of the Complaint, discovery was undertaken by both petitioner and respondent by means of depositions and interrogatories (App. 22). Because this lengthy discovery period disclosed that it was impossible to determine the basis of petitioner's alleged cause of action, attorneys for both parties conferred with the Court on November 7, 1968 in order to establish a pretrial procedure which would compel petitioner to state the basis for its cause of action and allow respondent a brief period of discovery thereafter (App. 23). On November 18, 1968, the Court filed an order (which was prepared by attorneys for petitioner) providing, *inter alia,* that petitioner complete its discovery within 60 days and file a narrative written statement of the facts within 70 days from November 18, 1968 (App. 23).

Petitioner still did not file its pretrial narrative statement when required, and, on April 1, 1969, respondent's attorneys requested that petitioner file said statement (App. 25). Rather than file a pretrial narrative statement, petitioner filed, on April 4, 1969, a Motion to

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*This fact was appropriately documented in the United States Court of Appeals for the Third Circuit but cannot be documented from the appendix attached to petitioner's Petition for Writ of Certiorari.

Transfer requesting that the action be removed to the Middle District of Pennsylvania (App. 25). Respondent then filed, on April 7, 1969, a Motion to Dismiss under Rule 41(b) of the Federal Rules of Civil Procedure (App. 25). Following argument on these two motions, the Court, on April 16, 1969, ordered (1) that petitioner's Motion to Transfer be denied; and, (2) that respondent's Motion to Dismiss be denied but if petitioner failed to file its narrative statement by September 16, 1969 the Court, upon proper notice, would dismiss the action with prejudice (App. 25-26).

When petitioner had still not complied with the deadline, respondent, two weeks after the expiration of said deadline, filed on September 30, 1969 a Motion to Dismiss *with prejudice* (App. 22-27). On October 1, 1969 the Court ordered the Western District action dismissed *"without prejudice"* (App. 28).

Respondent heard nothing more about the Western District action until June 24, 1970 at which time petitioner filed a Motion for Transfer of Proceedings under Section 1407 of the Judicial Code with the Judicial Panel on Multidistrict Litigation.* Since no action was pending, the Panel took no action on the Motion. Two days later petitioner filed a Motion to Vacate Order which requested that the Court set aside the order of October 1, 1969 which dismissed the action *without prejudice* (App. 29).

On September 8, 1970 Judge Rabe B. Marsh, who presided over all of the proceedings in the Western Dis-

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trict action, held a hearing on petitioner's Motion to Vacate (App. 31). At this hearing, it was admitted by counsel for petitioner that the case was based on a cause of action for fraud and deceit, and that, at the time of the argument, the period prescribed by the statute of limitations had expired (App. 33). Following argument Judge Marsh denied petitioner's Motion to Vacate by an order dated September 8, 1970 (App. 56). No appeal was ever taken from this order in spite of the fact that Judge Marsh made it clear that the dismissal was *with prejudice* (App. 53).

On June 7, 1972, almost ten years after the petitioner purchased the equipment and eight years after its business was sold, petitioner filed this lawsuit in the Middle District of Pennsylvania (App. 18). The Complaint set forth the same cause of action which was alleged in the Complaint filed in the Western District action filed on July 19, 1966.

On July 24, 1972 respondent filed a Motion to Dismiss and a Motion for Summary Judgment pursuant to Rules 12(b)(6), 41(b) and 56 of the Federal Rules of Civil Procedure.* These motions were based on the facts that (1) the period prescribed by the Statute of Limitations had expired; (2) the ruling of Judge Marsh was final and barred the Middle District action by virtue of the doctrine of *res judicata;* and (3) the United States District Court for the Middle District of Pennsylvania could not overrule the United States District Court for the Western District of Pennsylvania, a court of con-

*This fact was appropriately documented in the United States Court of Appeals for the Third Circuit but cannot be documented from the appendix attached to petitioner's Petition for Writ of Certiorari.

current jurisdiction.* Judge R. Dixon Herman, who presided over the Middle District action, granted respondent Summary Judgment on two grounds: (1) because the action was barred by the Statute of Limitations and, (2) because the action had already been dismissed with finality at Civil Action No. 66-865 by the United States District Court for the Western District of Pennsylvania (App. 57). The United States Court of Appeals for the Third Circuit affirmed Judge Herman's order and later denied rehearing (App. 10-12). Petitioner now seeks a Writ of Certiorari solely on the ground that it was denied due process because the United States Court of Appeals for the Third Circuit treated the dismissal of the Western District action as a dismissal *with prejudice.*

ARGUMENT OF RESPONDENT

There are no special or important reasons for granting petitioner's petition for writ of certiorari.

Respondent cannot argue with the proposition set forth in petitioner's Petition for Writ of Certiorari that the Supreme Court of the United States should rectify the situation when a person is denied due process of law. Petitioner, however, has not been denied due process.

Petitioner has overlooked the fact that the United States District Court for the Middle District of Pennsylvania granted respondent's Motion for Summary

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Judgment on the following two grounds and the United States Court of Appeals for the Third Circuit affirmed the decision on both grounds: (1) the action had been dismissed with finality in the United States District Court for the Western District of Pennsylvania and, (2) the applicable Statute of Limitations barred petitioner's action. Thus, even assuming that petitioner is correct in its contention that both courts erred in determining that petitioner's cause of action had been dismissed with finality, the United States District Court for the Middle District of Pennsylvania still properly granted respondent Summary Judgment because petitioner's claim is barred by the Statute of Limitations. The defense of the Statute of Limitations was properly raised in a Motion for Summary Judgment filed prior to the time of the Answer and the United States District Court for the Middle District of Pennsylvania properly granted Summary Judgment when it found that petitioner's claim was barred by the Statute of Limitations. *Hartmann v. Time, Inc.* 166 F.2d 127 (3d Cir. 1947), *cert. denied,* 334 U.S. 838 (1948).

Moreover, the claim of error raised in petitioner's Petition for Writ of Certiorari does not merit consideration by this Court. The United States Court of Appeals for the Third Circuit did not hold that a dismissal *without prejudice* is a final dismissal thus invoking the doctrine of *res judicata.* Rather the United States Court of Appeals for the Third Circuit decided that, based on the unique facts of this case, petitioner's cause of action had been dismissed with finality and could not be raised again because of the doctrine of *res judicata.*

While it is true that the initial dismissal of the Western District action was "*without prejudice*" the

Court's subsequent order and the transcript of the hearing on the Motion to Vacate leads to the inescapable conclusion that the refusal to grant the Motion to Vacate effected a dismissal *with prejudice*. At the hearing Judge Marsh acknowledged that he had dismissed this action *without prejudice* although he indicated that he did not understand why he had dismissed it *without prejudice* (App. 32). It is clear from the record that during the course of the hearing on the Motion to Vacate, Judge Marsh knew that the only avenue open to petitioner to bring its action at that time was through a reopening of the proceedings in the Western District. Petitioner's counsel told the Court that the period prescribed by the Statute of Limitations had expired. Thus, when Judge Marsh denied the Motion to Vacate, he knew that the litigation was permanently barred. Petitioner's counsel made it abundantly clear to Judge Marsh that no further litigation could be brought anywhere. The dismissal of the Motion to Vacate effectively turned Judge Marsh's 41(b) dismissal into a dismissal *with prejudice*.

Petitioner's Motion to Vacate in the Western District action was based upon Rule 60(b) of the Federal Rules of Civil Procedure. The denial of that motion was a final, appealable order. *Hines v. Seaboard Air Line Railroad Co.*, 341 F.2d 229 (2d Cir. 1965). When the petitioner, after learning that Judge Marsh's dismissal was intended to be *with prejudice*, did not appeal from Judge Marsh's order denying its Motion to Vacate, the judgment became final and was a bar to any future action. Petitioner does not deny that the same issues were raised in the Western District action as were raised in the instant action. Thus, the United States Court of Appeals for the Third Circuit correctly affirmed the order of

the United States District Court for Middle District of Pennsylvania which granted respondent's Motion for Summary Judgment based on the doctrine of *res judicata.*

The United States Court of Appeals for the Third Circuit did not render any decision which is in conflict with the decision of another Court of Appeals on the same matter; it did not decide an important state or territorial question in a way that conflicts with applicable state or territorial law; it did not decide an important question of federal law which has not been previously settled by the Supreme Court of the United States; it did not decide a federal question that conflicts in any way with applicable decisions of the United States Supreme Court; and it did not depart from accepted and usual procedures such as would call for the exercise of the United States Supreme Court's power of supervision.

For the above reasons this Court must deny petitioner's Petition for Writ of Certiorari.

CONCLUSION

Petitioner's Petition for Writ of Certiorari does not raise any questions which call for a determination by the Supreme Court of the United States. Therefore, this Court must deny petitioner's Petition for Writ of Certiorari.

Respectively submitted,

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